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ABSTRACT

Focusing on the development of American Indian law and order, this monograph presents basic historical data chronologically ordered under the following headings: (1) Indian America (tribal and linguistic groups, migration, the American cultural zones); (2) Colonial America (early colonization, Indian legal land title vs. title of occupancy, Indian external and internal sovereignty, the French and Indian Wars, development of Indian Affairs after 1763); (3) The War of Independence and the Post Revolutionary Period (Indian neutrality and Indian Affairs, the erosion of tribal sovereignty with adoption of the U.S. Constitution, creation of the Bureau of Indian Affairs--BIA); (4) The Period of National Expansion (forced removal of tribes to new lands and the "Trail of Tears," treaties, Indian Wars of the 1860's); (5) The Post Civil War Period (western Indian reservations established, breakdown of tribal economy and the "feeding policy," Federal paternalism, the allotment system and further loss of land, and the Competency Act of 1906); (6) The Indian of the 20th Century (voting rights, the Meriam Report and reform, the Indian Reorganization Act of 1946); (7) The Administration of Justice by Tribal Governments (limited internal and external sovereignty, tribal vs European-American concepts of justice, tribal vs. State and municipal governments). (JC)

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Historical Backgrounds For Modern Indian Law & Order

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AN OUTLINE OF INDIAN HISTORY

Many immigrant peoples have entered the American Continents across the span of many thousands of years. Initially most, if not all, of the newcomers came from Asia; more recently, they have come chiefly from Europe following a different migration route than the early peoples.

The following outline traces Indian relationships with the European immigrants after 1492 with special reference to--

1. Land status
2. Tribal sovereignty
3. Tribal self-government

--all of which were deeply affected as European, and finally American, governments extended their dominion over the New World, establishing an evertightening cultural and political framework within which Indian development has taken place.

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April, 1969

Number of politically separate tribal groups and bands may have been as high as 3,000 in North America.

SEE: The American Indian; Indians of the United States, by Clark Wissler.

Indian Tribes of North America. Memoir 9, Indiana Univ. Publ. in Anthro. & Linguistics.

Handbook of American Indians North of Mexico. BAE - Smithsonian Inst. Bulletin 30.

56 language stocks, each including many separate languages & dialects. International Journal of American Linguistics Vol. XXVIII (1962) & Vol. XXXI (1965) (W.L. Chafe).

Many cultural zones throughout North America.

1. INDIAN AMERICA. There are various estimates of the number of politically separate Indian tribes and communities at the time of Columbus' discovery in 1492. Some range as high as 3,000 for North America alone. The early literature contains more than 2,500 names applied to tribes, bands, communities and other types of sub-groups for North America north of Mexico, although upon analysis many of these names are identified as variant forms of the same Indian words, as heard or misheard by English, French, Spanish Dutch, Swedish and other Europeans; or they are identifiable, in some cases, with clans and phratries, or with place names.

It appears that, at the time of Columbus, there were at least 238 major tribal groups in North America, each including varying numbers of bands and other types of politically separate sub-groups.

In the portion of North America comprising what is now the United States and Canada, there were at least 56 major linguistic stocks. These with their numerous separate languages and their many dialects, probably made up some 500 or more speech communities. In addition, there are about 29 language stocks in Mexico and Central America, and about 84 in South America, each with many languages and dialects.

Many sub-groups spoke the same or very closely related languages. For example, the Pueblos of Acoma, Laguna, Zia, Santa Ana, San Felipe, Cochiti and Santo Domingo are all Keres speaking, with dialect differences; closely related culturally - but each of them is a separate and distinct community politically.

At the time of Columbus' discovery Indian tribes lived in a variety of manners depending, in part, on the geographical environment they occupied. Those who lived in what is now the United States can be broadly classed as the Woodsmen of the Eastern Forests, the Hunting Tribes of the Great Plains, the Pueblo Farmers, the Desert Peoples, the Seed Gatherers of Western United States, the Fisherman of the Northwest Pacific Coast, and the People of the Arctic Regions.

New World is scene of many successive waves of migration, beginning 15,000 or more years ago.

New World "discovered" many times, by each succeeding group of newcomers.

Europeans and Africans are recent "discoverers" of New World.

Preceding cultures often over-ran, conquered, displaced or absorbed by incoming peoples.

Prehistorically, the American Continents, like other parts of the world, were the scene of wave after wave of human migrations extending from a remote period when men hunted mammoths, giant sloths, and other animals long since extinct down to recent times. Folsom Man, distinguished by a peculiar spear point, and Clovis Man were among the earliest of which we have an archaeological record. Other waves of immigrants followed, entering the New World, probably from Asia across an Alaskan land bridge; like the Basketmakers and the early Puebloan peoples many of them have left in their wake mementoes of their passing: artifacts, pithouses, camp fires, refuse heaps, mounds and the ruins of villages. Each new wave of immigrants "discovered" the New World, just as Columbus "discovered" it in much more recent times for the waves of European immigrants that followed. As one culture superimposed itself on another there is often little evidence of the fate of the previous occupants of an area. Sometimes, as comparative language and archaeological studies seem to indicate, they probably migrated away from the incoming peoples; in other instances, they may have been over-run and conquered, or merely absorbed by the newcomers. Prehistory is only now being reconstructed and many questions will never be answered. Whatever the case, the New World, like the Old, has been the scene of many changes as successive waves of immigrating peoples have entered it over the course of the past 15,000 years or more. Among the last of the major waves of immigrants have been the Europeans, Africans and Asiatics who came after 1492 by other routes.

233 politically separate Indian groups today, speaking about 300 languages & dialects.

Today, some 477 years after Columbus, there remain about 233 politically separate Indian tribal groups in the United States, speaking about 300 Indian languages and dialects. Of these, only 64 continue to be spoken by 1,000 persons or more. Six of the 56 language stocks that existed in the United States and Canada in 1492 have become extinct, and many of the 500 or more separate languages and dialects (the Piro speaking Pueblos and the Jumano, for example) have disappeared from the scene.

European "Discovery" and Conquest.

SEE: A Continent Lost - A Civilization Won by J.P. Kinney

2. COLONIAL AMERICA. On October 12, 1492 Christopher Columbus landed on one of the islands of the Bahama Group. Conquest quickly spread through the Caribbean to Mexico, Central America, South America and, in 1540-41, Coronado penetrated northward into what is now New Mexico ultimately reaching a point on the Great Plains somewhere in what is now Kansas.

Spain the dominant power for 3 centuries.

Although Portugal, France, England, Holland and Sweden also became interested at an early date in exploring and acquiring parts of the New World, Spain alone had permanent colonies here before 1600. During this period Spain dominated commerce with the New World, and she remained the Chief European power in the Americas for three centuries after Columbus.

The century following Columbus' voyages was one of exploration and continued "discovery" on the part of Europeans.

Early colonization by England, Holland, France in North America.

After a few unsuccessful attempts at colonization under individual leadership (Sir Walter Raleigh's attempt of 1585-1587 to start the Roanoke Colony, for example) England adopted the use of colonizing companies, chartered by the king. The first royal charter was given, on April 10, 1606, to two corporations, The Plymouth Company and The London Company, for the settlement of a region to be known as Virginia. Later, in 1623, Holland entered the picture and the Dutch West India Company sent out a colony to settle New Amsterdam, on the site of present New York City. Previously, in 1614, the United New Netherland Trading Company had built a trading post there. Likewise, Sweden sent a royal colony of Swedes and Finns to settle the Delaware region, in 1638. France, England, and Holland all interested themselves in the New World and colonies multiplied rapidly during the period 1606 to 1750.

Principle that title to the soil passes to "discoverer."

Indians retain title to occupancy only.

From the beginning, the Old World powers took the position that "discovery" gave title to the land to the Government by whose subjects or authority it was made. The Indians were admitted to be the rightful occupants of the soil, but it was agreed that the European Government that "discovered" or "took possession" of it acquired legal title against other European Governments.

Indian legal title to lands not defined in grants and charters issued by European governments, but title of occupancy was recognized as a matter of policy.

In granting charters, patents, and land grants to colonizing companies or to individuals, title to the soil was conveyed by the European governments subject only to rights of Indian occupancy which could be extinguished only by purchase, treaty or other form of Indian consent.

Chief Justice John Marshall, in an 1823 Supreme Court decision (Johnson v. McIntosh) summarized tribal property rights in the following words: "-----the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles."

External sovereignty of Indian tribes limited as a result of European discovery and possession.

United States becomes the successor in interest to former English lands after the War of Independence.

On the premise that title to lands in the New World was in the European Government which discovered and claimed an area, it was held that, when the United States won its independence from England, the United States became the successor sovereign, holding title to public domain lands ceded by Great Britain, for the people of the United States - and, in the case of the Indian lands, the United States held the title for the Indian occupants.

The external sovereignty of Indian tribes was unlimited before the Discovery of America and before the areas of land they occupied passed

to European control. They had all the power of independent nations to make war and peace negotiate with other independent nations, and dispose of their tribal property as they saw fit. After European governments laid claim to the New World, the external sovereignty of the Indian tribes was limited because the European governments involved acquired the exclusive right to purchase Indian lands from the tribes; and the tribes could not sell or convey the lands they occupied without the consent of the Crown. The tribes could no longer dispose of their property to whomever they wished for, from the European point of view, discovery and conquest placed the title to the soil in the Crown. Their external sovereignty was thus impaired and limited by the European governments at the time they "discovered" and took possession of large areas of land in the New World, but the internal sovereignty of the tribes - their right to govern themselves - remained unimpaired.

Internal sovereignty of Indian tribes remains unimpaired through Colonial Period.

Chief Justice Marshall observed (Johnson v. McIntosh 1823) that "Certain it is that our history furnishes no example, from the first settlement of our country, or any attempt on the part of the Crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers who, as traders or otherwise, might seduce them into foreign alliances."

Conquest alone does not extinguish the internal sovereignty of conquered nations.

Throughout the Colonial Period tribes retained their sovereign right to govern themselves. They were accepted as distinct political communities, with exclusive authority over their members, including the power to regulate the use and occupancy of tribal lands. It was never held from the earliest Colonial Period, that conquest itself terminated the internal sovereignty of a tribe. The powers of self-government could be limited or extinguished by the terms of treaties or by legislative acts of the conquering government, but not by the fact of conquest alone. These principles were set forth by the Supreme Court of the United States, at a later time (Worcester v. Georgia: 1832; Wall v. Williamson: 1845).

In the early 1600's, at the time the first colonies were established in the eastern part of what is now the United States, the position of the colonists was precarious.

Diplomatic - ambassadorial services maintained to deal with Indian tribes.

Surrounded by numerically superior Indian forces, they attempted to maintain peaceful relationships with the native peoples. To accomplish this purpose, a special diplomatic service was developed to deal with Indian problems. The concepts of property ownership held by the European "discoverers" were not immediately intelligible to the Indians, and trespass on what Indians considered to be their lands, coupled with sharp trading practices, high pressure tactics in promoting Christianization, and other factors, contributed to disorder and friction between the colonists and their frontier neighbors. In addition, the several European powers involved in colonization of the New World fought among themselves over the spoils of conquest and Indian tribes often became involved as allies of one or another of the European Governments.

European powers competed with one another for control of areas of the New World, and involved the tribes in their power struggles.

Settlers acquired the lands they occupied by various means including treaties with, gifts to, and purchases from the Indian occupants.

French and Indian Wars 1754 - 1763

During the period 1754 - 1763 England and France were involved in a struggle for power known as the Seven Years War, part of which was fought in the New World where it was known as the French and Indian War. France was defeated in this struggle and Great Britain emerged as the possessor of practically all of North America east of the Mississippi River. In this conflict, and in other situations involving the competing European powers, Indian tribes were directly involved as allies of one or another of the contending forces, usually with disastrous results.

Indian tribes became pawns in the European power struggle.

Repeatedly, the Indians were pawns in the European power struggle, not only in the regions dominated by England, France and Holland, but in the areas of Spanish domination, as well.

In Spanish America many Indian tribes, obliged to ally themselves with the invading Spaniards, made a heavy contribution to the success of

Indian allies a major force in the Spanish Conquest of Mexico and the Southwest

the conquest. In some situations such alliance was the price of survival, as in the Pueblos of New Mexico who were obliged to provide warriors to assist the Spaniards in their conflicts with the Navajos and Apaches. The latter were never overcome by Spanish arms but the Navajos and the Apaches came to look upon the Pueblos as enemies, and the Indian villages suffered along with the Spanish settlements in the centuries of warfare that followed.

Two Superintendencies of Indian Affairs established after 1763.

During the course of the French and Indian Wars, in 1756, two Superintendencies of Indian Affairs were established, one serving the Northern Colonies and one serving the Southern Colonies. Their function was primarily ambassadorial, designed to maintain peaceful relationships with the Indian tribes through the control of Indian trade and the regulation of land acquisition from the Indians. Both were sources of friction.

Balance of power shifts to colonists.

By the opening of the American War of Independence the balance of power had shifted, in the settled areas of the east, from the Indian tribes to the colonists.

Three Departments of Indian Affairs were established in 1775 by the Continental Congress to maintain Indian neutrality.

3. THE WAR OF INDEPENDENCE AND THE POST REVOLUTIONARY PERIOD. During the course of the American Revolutionary War, many of the eastern tribes were again pawns in the power struggle. The Revolutionary Government took immediate steps to forestall Indian alliances with the British and to maintain the neutrality of tribes along the frontiers. To accomplish this purpose three Departments of Indian Affairs were established, in 1775: A Northern, Middle and Southern Department serving the Northern, Middle and Southern Colonies. The importance of this effort is reflected in the fact that Benjamin Franklin, Patrick Henry and James Wilson were named as Commissioners in charge of the Middle Department.

The first treaty between an Indian tribe and the United States was made, on September 17, 1778, with the Delawares.

By ordinance of August 7, 1786, the Congress of the Confederation established a Northern and a Southern Department of Indian Affairs.

Later, in 1786, the Indian Affairs Department was reorganized by the Congress of the Confederation. At that time two Departments were established: A Northern and a Southern Department, with the Ohio River as the dividing line. Each was headed by a Superintendent reporting to the Secretary of War. Not only did they continue to function as an ambassadorial service, but they were empowered to grant licenses to trade with Indians and permits under which non-Indians could live with tribes.

United States is successor in all rights and interest to Great Britain after 1783.

In 1784, after the end of the American War of Independence, Great Britain ceded to the United States a large part of her territories in North America. During 1785-1786 the United States entered into treaties with a number of tribes occupying lands in the Northwest territories, including the Wyandotte, Delaware, Chippewa, Ottawa and Shawnee, under the terms of which the tribes acknowledged the sovereignty of the United States as the successor to Great Britain. The United States assumed all of the rights formerly held by Britain. In 1789 a similar treaty was negotiated with the tribes living in the territory northwest of the Ohio, including again the Wyandotte, Delaware, Ottawa, Chippewa, Potawatomi, and Sauk under the terms of which the United States "quit-claimed certain lands to the Indians to live and hunt upon, but forbade the sale of such lands except to the United States. Here was clear indication of the occupancy theory of Indian possession that was later accepted by the United States Supreme Court" (Kinney - A Continent Lost - A Civilization Won).

United States continues occupancy theory of Indian land possession.

Indian Affairs placed under War Department after adoption of American Constitution.

Following adoption of the American Constitution the Congress, on August 7, 1789, established the War Department and placed Indian Affairs formally under its jurisdiction. From this time on there was a progressive extension of Federal authority over the property and person of the Indian people. An erosion of the internal sovereignty of Indian tribes began.

The Erosion of Internal Tribal Sovereignty accelerated after adoption of American Constitution (1789).

In 1787, in the form of the Northwest Ordinance, the United States Government made its first formal expression of Indian policy. The Ordinance was confirmed by Congress in the Act of August 7, 1789, and provided

that (1) Indian land and property would not be taken without the consent of the tribes, (2) their property, rights and liberty would not be invaded or disturbed unless in just and lawful wars authorized by Congress, and (3) laws founded in justice and humanity would be enacted, from time to time, to prevent wrongs being done to the Indians and to preserve peace and friendship with them. The American Government, following adoption of the Constitution, began to concern itself with the protection of the Indian tribes, including the enactment of protective legislation.

American Constitution gave Federal Government exclusive jurisdiction over Indian Affairs.

Article 1, Section 8, cl 3 of the Constitution gave Congress the power to regulate commerce (trading) with Indian tribes and is the basis upon which the Federal Government assumed jurisdiction over Indian Affairs to the exclusion of the states.

Act of July 22, 1790, confers broad regulatory powers on President

The Commerce provision of the Constitution was given a broad interpretation and, on July 22, 1790, Congress acted to confer extensive regulatory powers on the President with respect to Indian matters, including authority to regulate land sales, take action in certain types of crimes and prevent trespass.

External Sovereignty of Indian tribes ends with adoption of American Constitution.

For Indian tribes under the jurisdiction of Congress external sovereignty ended with the adoption of the American Constitution and the assertion of Federal jurisdiction over Indian Affairs, but the tribes retained their internal sovereignty--the power to regulate their internal affairs. However, Federal Agencies began to assume an expanding role in regulating Indian relationships. During the period 1796-1882, the Federal Government operated the trading posts, in Indian Country, to assure fair prices and good treatment of the Indians.

Regulatory role of Federal Government increases rapidly.

Bureau of Indian Affairs created on March 11, 1824.

The Bureau of Indian Affairs was created on March 11, 1824, by order of Secretary of War Calhoun and by an Act of July 9, 1832, Congress created the office of Commissioner of Indian Affairs.

FEDERAL INDIAN LAW, Felix Cohen - Publ. 1958, GPO
The Office of Indian Affairs, by Lawrence E. Schmeckebier, publ. 1928 - Institute for Gov't Research.

Later, on June 30, 1834, Congress acted to establish a Department of Indian Affairs. It remained under the Department of War until 1849 when, by an Act of March 3 establishing the Home Department of the Interior, the Bureau of Indian Affairs was transferred from military to civil control.

Millions of acres of Indian land ceded to United States during period 1800-1817.

4. THE PERIOD OF NATIONAL EXPANSION. Beginning immediately after 1800 there was a great drive to open new lands for settlement in the west. During the period 1800-1817 millions of acres of such lands were obtained through the negotiation of treaties of cession with Indian tribes. The loss of these lands, led to unrest and opposition on the part of many Indian groups. Tecumseh, a leader of the Shawnees, threatened to ally his tribe with the British unless the treaties of cession ceased. Some tribes including part of the Creek Nation, joined the side of the British in the War of 1812 and, following their defeat in the Creek War of 1812-13 Andrew Jackson demanded the cession of 23 million acres as indemnity.

Indian reluctance to part with more land leads to forced removals of entire tribes to new lands farther west.

Reluctance on the part of the tribes to cede new lands, and the heavy pressure brought to bear by settlers were factors that led to initiation of the Indian Removal Policy during the period 1817-1846, under which the Federal Government offered lands farther west in exchange for territory east of the Mississippi River. Treaties of removal predominated after the War of 1812. The Cherokees were obliged to agree to such a treaty of duress in 1817, although migration remained voluntary.

The Jacksonian Period: 1829-1837

In 1829 Andrew Jackson became President of the United States. He had long favored the forced removal of Indians to the west, and the State of Georgia immediately began to harass the Cherokees in an attempt to destroy the tribal government. This harassment led to the celebrated Supreme Court decision delivered by Chief Justice John Marshall in 1832 (Worcester v. Georgia), which paved the way for the legal position that (1) originally Indian tribes had all the powers of any sovereign state; (2) conquest made them subject to the legislative power of the United States and terminated their external sovereignty, but (3) internal tribal sovereignty

Policies made to prevent alienation of Indian lands without consent of Congress.

remains in a tribe to the extent that it has not been extinguished or abridged by positive enactment of Congress, or limited by the terms of treaties.

Indian consent to land cession continued to be obtained through treaties.

Treaty-making continued as the chief medium through which to obtain Indian consent to land cession. The Act of June 30, 1834, provided that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." At the same time, this policy was designed to protect the tribes by preventing the alienation of their lands without the consent of Congress.

"Trail of Tears" Period

During the Jacksonian Period (1829-1837) the Cherokees, Chickasaws, Creeks and many other tribes were forced to move to new lands west of the Mississippi River. It was a period of great turmoil, and western lands soon became difficult to find.

During the 1800's the tide of immigration swelled, and the United States rapidly extended her boundaries westward across the continent to the Pacific Ocean.

Following the Mexican War of 1846-1848, Mexico ceded all of the old Province of New Mexico and California to the United States and acknowledged the annexation of Texas. The California Gold Rush of 1849 brought new hordes of adventurers westward.

Indian land holdings shrink. Public policy calls for reduction of Indian land areas.

As the competition for land grew the Indian tribes were directly affected. Their holdings shrank and public opinion took the position that the tribes should not be allowed to retain the large areas over which they roamed, but rather their holdings should be reduced to the acreage required for subsistence on the basis of agriculture. By 1853, the principle was already being advanced that Indian lands should be reduced to individual farm acreages with the surplus thrown open for settlement. It was proposed that the problem thus created be resolved by absorbing the Indians into the general population.

The Indian Wars of the 1860's.

By the mid-1800's the western tribes were deeply perturbed and during the Civil War (1861-1865) the Sioux, Comanche, Arapaho, Kiowa, Cheyenne, Crow, Apache, Navajo and others attempted to turn the tide and drive out the white people.

From 1800 until well after the Civil War the Bureau of Indian Affairs was deeply involved in the complex of human problems growing out of conflict between the Indian tribes and the non-Indian immigrants.

Western Indian Reservations established, largely during the period 1863-1867.

5. THE POST CIVIL WAR PERIOD. During the period 1863-1867 most of the western Indian reservations were established, setting aside for the use and occupancy of the tribes a portion of their former land holdings, or designating other lands for their use and occupancy. Until 1871, the Federal Government negotiated land cessions by treaty, as it had in the past. The Act of March 3,1871, however brought an end to treaty-making with Indian tribes, and reservations were thereafter established by Executive Order of the President or by Act of Congress.

Treaty making with Indian tribes ended in 1871.

Confinement on Reservations led to breakdown of tribal economy and gave rise to "feeding policy" of the 1870's.

The confinement of western Indian tribes to reservations quickly led to social and economic breakdown. The hunting tribes could no longer subsist by following the buffalo herds, and they were not culturally conditioned to substitute intensive agriculture for their traditional way of life. As a result, Indians came to be regarded as objects of the national charity, and their survival hinged on the "feeding policy" instituted in the 1870's - a system of rationing to prevent starvation.

Rise of Federal Paternalism.

At the same time, with the breakdown of traditional tribal government and control, the Federal Government stepped into the gap, using the troops when necessary, and ushering in a paternalistic relationship with the tribes which continued through the first quarter of the 1900's.

Institution of the "Peace Policy."

The Act of April 10, 1869, had paved the way for presidential action designed to end the Indian wars including settlement of the tribes on reservations, "civilization" of

the Indians, and appointment of a Board of Indian Commissioners which President Grant established in 1869. In the same year, it submitted six important recommendations including (1) allotment of Indian lands in severalty, (2) abolition of Indian treaty making, and (3) establishment of schools and industrial training. School operation was contracted to the major church denominations - an arrangement that did not end until after 1897, and the Board continued until 1933.

The possessory right of Indian tribes to reservation lands varies. In some instances Congress has made specific grants of fee simple rights; in other instances given areas of land are reserved "for the use and occupancy of" a tribe. The two major methods of establishing reservations have been (1) public land withdrawal, and (2) purchase of private land. However, Indian tribes have acquired interests in real property in a number of ways, including (1) aboriginal possession, (2) treaty, (3) Act of Congress, (4) Executive Order, (5) purchase, and (6) action of a colony, state or foreign nation. The United States generally holds the title to reservation lands, while the right of use and occupancy is in the Indians. The consent of the United States is generally required for the sale, conveyance or lease of tribal lands, continuing the principles developed in colonial times under which tribes could sell or convey their lands only with the consent of the Crown or the colonial government. In colonial times the consent of both parties was usually obtained by treaty and an Act of March 1, 1793, continued this procedure after the United States replaced Great Britain as the sovereign. In more recent times the consent of the United States is usually given by the Secretary of the Interior with respect to leasing, and by Congress in the sale or alienation of Indian lands. The tribal council acts to give tribal consent.

Individualization of tribal land holdings through the allotment system brought further losses in the tribal land base.

The shrinkage and individualization of Indian land holdings remained a popular national objective until well after the turn of the 20th Century, and the General Allotment Act of February 8, 1887, opened the way for the allotment of reservation lands to individual Indians. As a result, by 1890, 17.4 million

acres - 1/7 of all remaining Indian land - was acquired by the Federal Government and thrown open to settlement.

The "Competency Act" of 1906.

Indian allotments were required to be held in trust for a 25-year period by the Federal Government, but an Act of Congress in 1906 permitted the Secretary of the Interior to issue titles to allotments in fee simple if Indian applicants were adjudged to be "competent." Again large acreages of Indian lands passed out of Indian ownership, either as a result of outright sale by the owners, or as a result of forced sale for non-payment of property taxes.

Land losses had a further demoralizing effect on reservations and shrinkage of the land base accelerated the breakdown of tribal societies.

In 1948 a 3-judge Federal District Court, in Trujillo v. Garley, opened the way to Indian voting in New Mexico holding a provision of the State Constitution to be in violation of the 14th & 15th Amendments of the Federal Constitution; and in 1948 the Arizona Supreme Court in Harrison v. Laveen gave the vote to Arizona Indians.

6. THE INDIAN OF THE TWENTIETH CENTURY. After the turn of the 20th Century, Congress and the American public became increasingly concerned with Indian welfare and development. A few boarding schools had been built during the period 1880-1902, most of them situated at locations distant from the reservations, and after 1900 schools began to appear on the reservations themselves. An effort was made to "de-Indianize" Indian children and pave the way for their absorption into the national population. The early schools were poorly financed.

An Act of June 2, 1924, conferred citizenship on all Indians who had not already achieved that status, although some states did not modify their constitutions to permit Reservation Indians to vote until after World War II.

The Meriam Report of 1928 and the era of reform in Indian administration.

During the period 1926-1928 the Institute for Government Research carried out a survey of social and economic conditions on Indian Reservations and issued a comprehensive report entitled The Problem of Indian Administration - more popularly known as "The Meriam Report." The shocking social and economic conditions it reflected on Indian Reservations led to increased appropriations by Congress and a shift in emphasis by the American public and the Federal Government away from custodial functions toward human development.

National policy begins to shift toward Indian development.

Education policy reversed in the 1930's.

Under Commissioner John Collier, Federal Indian Administration underwent revolutionary changes. Education policy was reversed, and emphasis was placed on the construction of schools on Indian Reservations where they could provide the nuclei for community development; the loss of Indian lands was halted; and an attack was launched on the serious health problems that were so common among Indian populations.

The Indian Reorganization Act of June 18, 1934, provided a statutory vehicle for reforms in Indian administration.

In large part, the new direction in Indian affairs found its way into law with the passage of the Indian Reorganization Act of June 18, 1934. On the principles set forth by Chief Justice John Marshall in 1832 - that Indian tribes retained their internal sovereignty to the extent that it had not been extinguished or limited by the terms of treaties or by Act of Congress - the tribes were encouraged to reorganize and to exercise their residual sovereignty through the medium of tribal governments based on tribal constitutions. Section 16 of the Act of June 18, 1934, opened the way for this development and many tribes took advantage of the new opportunity thus offered them. On many reservations traditional tribal governmental organizations had broken down or disappeared from the scene during the long period of conflict and paternalistic control.

Indian tribes had to vote on acceptance or rejection of Indian Reorganization Act. 233 tribal elections were held during 1934 - 1936 and 181 tribes representing 129,750 Indians voted acceptance, while 77 tribes, representing 86,365 Indians rejected the Act.

First tribal constitution adopted under the Indian Reorganization Act was that of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana, approved on October 28, 1935.

It was not with a view to re-establishing the Indian tribes as political enclaves in the nation that the reorganization of tribal government was encouraged - rather, this course was taken in the conviction that social and economic progress on the reservations was possible only if the Indian people themselves were organized to participate in planning and carrying out the essential programs.

Changing role of the Bureau of Indian Affairs reflects changing national attitudes and congressional directives.

The Meriam report of 1928 and the Indian Reorganization Act of 1934 were turning points in Indian history and in the history of the Bureau of Indian Affairs. Beginning as an ambassadorial service some 200 years ago, the Bureau was involved in the negotiation of Indian treaties and the removal of tribes during the period of national expansion; its agents and employees sought to protect the tribes and their remaining lands from further encroachment after the establishment of the reservations; the Bureau provided necessary

custodial services, and it was the instrument for paternalistic control during the latter part of the past century. The function of the Bureau changed from period to period over the course of American history as national attitudes and congressional requirements dictated.

Bureau of Indian Affairs emphasizes Indian development, especially after 1934.

Finally, and especially after 1934, the Bureau of Indian Affairs became the principal agency of Government charged with responsibility for human development on Indian reservations.

Since 1934, most reservation tribes have reorganized their tribal governments and have taken long strides in the conquest of reservation problems with the help of the Bureau and many other Federal and State Agencies.

Indian Claims Act of August 13, 1946, provides the basis for compensation to tribes whose lands were taken, and 109 awards totaling $290,533,012 to date (April 1, 1969) provide capital for reservation development.

The Indian Claims Act of August 13, 1946, established an Indian Claims Commission and opened the way for tribes to enter claims against the Federal Government for lands and property wrongfully taken from them by the United States, before 1946. Awards totaling many millions of dollars have been paid and many tribes have used their claims money for productive reservation development. In addition, some tribes have received substantial incomes from mineral, timber and other resource developments on their reservations. The productive uses to which many tribes have put tribal revenues reflect the effectiveness of their own tribal organization.

Indian people today have found their place as American citizens in the national society without losing their identity as Indians.

Reorganized tribal governments are patterned after Anglo-American institutions.

The tribal governments that were revived under the Indian Reorganization Act were, for the most part, patterned after standard Anglo-American democratic representative institutions. In view of the fact that traditional native governmental organizations had long since broken down among most tribal groups, the non-Indian framework within which reorganization took place did not meet with the resistance it might otherwise have had. Traditional concepts of government still played a part, influencing the structure and operation of the reorganized tribal councils, but the predominant features were those of non-Indian society. Under most of the IRA

Initially, reorganized tribal governments did not separate their executive, legislative and judicial functions into departments.

constitutions, council delegates are elected by popular vote as representatives of the people. In most situations the council initially functioned as the executive as well as the legislative body - and sometimes it had judicial responsibilities as well. Since 1934, the trend has been in the direction of separating the executive, legislative, and judicial functions of tribal government. Gradually, council chairmen have been delegated executive authority by the councils as tribal business and activities expanded and in a few instances (the Mescalero and Jicarilla Apache, for example) the tribal constitutions have been revised to provide formal separation of the three departments of government - a reorganization in which the office of council chairman has become that of tribal president, and identified as the chief executive officer of the tribe.

Pueblo Government is a general exception in that the traditional institution did not break down in the 19th Century, but continued to the present day.

A general exception to the course of events surrounding other tribes has been the 19 Pueblos of New Mexico whose village governments have continued, with minor modifications since pre-Spanish times. Although all but one of those Indian communities (Jemez accepted the Indian Reorganization Act of 1934, only three have adopted tribal constitutions (Laguna, Isleta and Santa Clara) - and these reflect a blending of traditional Puebloan and Anglo-American concepts. Throughout the historical period, beginning with Coronado's invasion of New Mexico in 1540, the Pueblos have successfully retained the fundamental institutions of their pre-Columbian culture, despite persecution and heavy pressures to change. Their lands remain essentially the grants they received from the Spanish Crown, with areas added by Executive Order or purchase during the American Period and they are held in fee simple title under patents from the United States. No treaties were entered into between the United States and the Pueblos except to the extent that they were protected as Mexican citizens and not as Indians by the terms of the Treaty of Guadalupe Hidalgo between the United States and Mexico at the close of the Mexican War.

Title to Pueblo land grants came from the Spanish Government.

The territorial legislature, in 1847, recognized the Pueblos as "bodies politic and corporate", and in 1858 Congress acted to

confirm Pueblo land titles subject to any "adverse valid rights." Squatters on Pueblo land, beginning in Spanish times, had constituted a long standing problem which was not resolved until after 1924 with the establishment of the Pueblo land status and the court actions taken by the Department of Justice to quiet title to lands shown to be the property of the Pueblos.

Pueblos came under Federal control, on a par with other Indians after 1912.

It was not until after New Mexico's admission to statehood in 1912, that the Pueblos came under Federal control as Indians, on a par with other tribes throughout the nation.

Power to administer justice is an aspect of residual tribal sovereignty. External sovereignty limited.

7. THE ADMINISTRATION OF JUSTICE BY TRIBAL GOVERNMENTS. The Indian tribes began their existence as sovereign nations, with full power to deal with other politically independent communities on the one hand (external sovereignty) and to regulate their internal affairs on the other (internal sovereignty). Their external powers were limited by European governments which "discovered" and extended their jurisdiction over areas of the New World, and the external sovereign powers of Indian tribes in the United States were extinguished with the adoption of the American Constitution in 1789.

Internal sovereignty limited by enactments of Congress.

The American Constitution gave Congress the power to regulate commerce with Indian tribes and provided the basis upon which the Federal Government took jurisdiction over Indian affairs to the exclusion of the states. After 1789, the Federal Government rapidly expanded its regulatory role in its relationship with Indians.

With national expansion in the 19th Century, Indian tribes were obliged to move westward or they were placed on reservations - during the latter part of the century many of the reservations were broken up into allotments. The resulting turmoil and disruption of tribal life led to a breakdown in tribal government on most reservations. There were some exceptions - for example, the Pueblos of New Mexico retained their traditional governmental organizations; and after two centuries of contact with European culture before their removal westward the Five Civilized Tribes were able to maintain their tribal governments, organized

The internal sovereignty of tribes was limited at an early period in American history as it related to relationships with non-Indians, but remained intact in the regulation of internal tribal affairs until tribal governmental organizations broke down.

on the basis of tribal constitutions patterned on American forms. They adopted law codes, built jails, maintained tribal police, operated schools and otherwise acted in the interest of their survival as tribes.

For the majority of the tribes, Federal Agencies had to step into the vacuum left when native governmental organizations ceased to operate. Some tribes had never functioned as tribal political entities - they had been organized traditionally on a band or local group basis, with varying degrees of autonomy.

Initially the tribes had administered justice on the basis of tribal law and custom, punishing not only their own members but non-members and non-Indians, as well, for crimes committed on the lands under their jurisdiction. However, even before the adoption of the American Constitution the trend was to provide that Indians committing crimes against citizens of the United States be turned over to the United States for punishment. Treaties with the Wyandotte and the Cherokees so provided, as early as 1785. The punishment of crimes committed by Indians against Indians remained in the hands of the tribes as long as the tribal governments were capable of administering justice.

The Federal Courts have limited jurisdiction and state jurisdiction was excluded until very recent times (Act of August 15, 1953; Act of April 11, 1958). The gap had to be filled by tribal jurisdiction or by makeshift arrangements.

Act of March 3, 1885, limited the power of Indian tribes and their courts over certain major crimes.

The Act of March 3, 1885, gave to the Federal Court jurisdiction over certain major offenses committed by Indians against Indians, including murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. Later, robbery, incest, assault with a deadly weapon, embezzlement and certain other offenses were added. The action of Congress in conferring jurisdiction over these offenses on the Federal courts filled the gap that had formed on most reservations as a result of the breakdown of native governmental organizations, while at the same time it was a further invasion of the internal sovereignty of the tribes.

Courts of Indian Offenses created in 1883.

In the early 1880's conditions had become so bad in some reservations that the Indian Agents and even the tribal police were obliged to double as judges. As a result, in 1883, the Secretary of the Interior authorized the establishment of Courts of Indian Offenses which dispensed justice on the basis of a code of laws developed by the Department of the Interior. Courts of Indian Offenses were established only where tribal organizations had broken down. They reached their peak in about 1900 at which time two thirds of all reservation agencies had them.

Indian Police and Judges, by Wilson T. Hagan - Publ. 1966 Yale Western Americana Series No. 13, Yale Univ. Press.

The Courts of Indian Offenses were not very successful. They received very little financial support - in fact, the Indian judges in the Courts of Indian Offenses received no salary at all until 1888, and thereafter they were paid only $3-$8 per month. The judges were recruited from the "progressive" elements within the tribal population and they reflected non-Indian attitudes and prejudices against such native institutions as religion, ceremonialism, medicine men, polygamy and other cultural features. The judges were not trained and their "decisions" were often dictated by the Agent or by the police.

General Allotment Act of 1887 and the Curtis Act of 1898 threatened extinction of Indian self-government.

After passage of the Allotment Act of 1887 - also known as the Dawes Act - Indians receiving allotments went under state civil and criminal jurisdiction. Under the terms of the Act they became citizens and Commissioner T. J. Morgan held, in 1892, that "there can be no system of Indian Courts where Indians have become citizens, and no system of Indian police."

The Curtis Act of 1898 dealt a death blow to the tribal courts and police of the Five Civilized Tribes, applying the allotment principles of the Dawes Act, and providing for the dissolution of their tribal governments by 1906.

Indian Reorganization Act of 1934 opens the way to re-establishment of tribal self-government.

The Competency Act of 1907 opened the doors wider to further shrinkage of tribal lands and internal tribal sovereignty. Conditions on the reservations grew steadily worse until the initiation of a reform movement after World War I which culminated in the Indian Reorganization Act of 1934. In its original form, the Reorganization Act contemplated a

Reorganized tribes adopted codes of law patterned after European-American concepts of justice.

special court of Indian affairs but the section embodying this court was eliminated. However, Section 16 of the Act authorized tribes to reorganize under tribal constitutions, and the modern tribal courts came into being with the reorganized tribal governments. They administer justice pursuant to a tribal code of laws, usually subject to approval by the Secretary of the Interior - or, in the absence of such a code, they use that contained in the Code of Federal Regulations, Title 25.

On the basis of Chief Justice Marshall's decision the principle was established that Indian tribes retained all of their internal sovereign powers to the extent that they were not waived or limited by treaty or by positive enactments of Congress. Those powers of self-government that were not thus limited or extinguished were still retained and could be exercised by the tribes. Furthermore, it was held that residual tribal sovereignty was not lost or impaired by failure of a tribe to exercise it. Consequently, tribes that reorganized under the Indian Reorganization Act or otherwise could exercise all of their residual sovereign powers even though they might not have exercised them previously on a tribal basis - or even though there might have been a period during which they ceased to exercise them.

Residual tribal sovereignty is exercised today within a framework imposed by Congress in which tribal custom and usage are giving way to European-American philosophies and procedures of government.

In the administration of justice on Indian reservations the trend has been in the direction of adoption of European-American concepts of law and punishment rather than continuation of traditional tribal concepts and usages. To some extent there has been a blending of the two systems and philosophies, and in a few tribal situations traditional concepts and practices are still important. Title II of the 1968 Civil Rights Act (the Act of April 11, 1968) further limits internal tribal sovereignty to the extent that it makes applicable to Indian tribal governments, in their relationship to the Indian people under their jurisdiction, most of the same restrictions and guarantees as the American Constitution applies to the Congress under the Bill of Rights. Thus, in the exercise of their residual internal sovereign powers, the tribes have patterned - or are encouraged and som-

times required to pattern - their organization and procedures on European-American usages and principles.

Habeas Corpus.

Title II of the Act of April 11, 1968, (Public Law 90-284, Civil Rights Act of 1968) also provides that any Indian person who believes himself to be wrongfully held in jail by order of an Indian Tribal Court can petition a Federal Court for a writ of habeas corpus, i.e. a court order that has the effect of testing the legality of the order issued by the Tribal Court.

Power of tribal courts to punish offenders against tribal law limited.

In addition, the 1968 Civil Rights Act limits the punishment that can be meted out by the tribal courts to a maximum of six months in prison or a fine of $500, or both, for conviction of any one offense.

Tribes may request assumption of state jurisdiction.

Under existing law Indian tribes can elect to abandon their judicial and law enforcement functions entirely and permit the states to assume criminal and civil jurisdiction over the reservations.

Tribal custom in the area of social control and the administration of justice varied from group to group, traditionally.

Ridicule and social pressures important instruments for securing conformity with tribal laws.

Crimes against property insignificant in traditional Indian cultures.

Traditionally the tribes varied somewhat in their customs and usages in the area of social control. However, in most instances ridicule and social pressures were relied upon to obtain conformity with tribal law. Punishment, when necessary, might take the form of personal embarrassment, corporal punishment, payment to the victim or his family, vendettas, retribution, banishment or execution. Crimes against property were insignificant in most traditional Indian societies. Sharing and cooperation were stressed as cultural values, and the scarcity of personal possessions made stolen objects conspicuous in a closely knit community.

Among the Plains Indians homicide, adultery and violations of hunting rules were paramount crimes. The tip of the nose or the entire nose of adulterous wives was cut off, and among the Cheyenne murderers were banished.

Corporal punishment.

Cherokee law required 100 lashes for horse theft, while rapists were punished with 50 lashes and the left ear was cropped close to the head for the first offense. A second offense brought 100 lashes and the right ear was cropped; a third offense was punished by execution.

The Plains Tribes were divided into bands fo ten or eleven months of the year following the buffalo herds, each under its own Chief who administered justice.

Among the Pueblos of the Southwest, offenses fell into two broad categories: (1) those against the community, including witchcraft and crimes against the religious-ceremonial system; and (2) those against individuals, including theft, murder, rape, adultery and slander.

Zuni Law by Watson Smith and John M. Roberts, publ. 1954 by Peabody Museum of America, Arch. & Ethnol., Harvard Univ. Vol. 43-No. 1.

Witchcraft was greatly feared and accused witches were dealt with harshly. Such a person might be hung from a horizontal bar set up in the plaza, suspended by his feet, thumbs or by his arms tied behind his back. He would be "encouraged" to confess, sometimes by periodic clubbings, on the premise that powers confessed were powers lost. Accused witches were sometimes executed and so great was the fear of witchcraft that entire villages were sometimes wiped out as nests of sorcerers - or villages split with part of the population leaving. After confession, accused witches might be required to undergo purification before being released.

Among the Zuni, the only crimes punishable by death were witchcraft and cowardice in battle.

Violation of ceremonial procedures and requirements among the Pueblos was sometimes punished by whipping. The divulging of religious secrets was a serious offense against the entire community, especially in the face of Spanish religious persecution, because the religious-ceremonial system was thus jeopardized, and it was considered to be an institution of first importance in the life of the Pueblos.

Ridicule was a means of restraint and punishment. An offender might be obliged to dress in clothing proper to the opposite sex; sit alone in the middle of the plaza exposed to the mockery of all who passed by; or be the butt of public jeering at the hands of the clowns during ceremonies.

At Zuni, thieves were obliged to repay stolen items - ten for one, in the case of sheep.

Trial of offenders against tribal law was a function of the Governor and his staff or the council among the Pueblos, and a function of the Chief, the council or other tribal governmental officials among other tribes.

Trials of offenders accused of crimes against individuals were conducted by the civil leaders (the Governor and his staff) or by the entire council.

Murder was considered a crime against the individual and his family. The murderer could be required to make retribution in the form of goods; he might be obliged to substitute his labor for that of his victim; or he might be punished privately by the kinfolk of the victim.

Rape was viewed as an offense, not because of the sexual relationship involved, but because of the lack of consent of the victim, and the offender could be required to make payment to the victim.

Crime viewed as a threat to essential harmony between man and nature among Puebloans and Apachean peoples.

Among the Navajo, as among the Pueblo peoples, harmony between man and nature, and between men was a primary value. Chaos and disharmony were to be avoided at all cost, and crime was a prime source of disorder. Ridicule, restitution and private punishment administered by one's kinfolk were among the media used to secure conformity with social requirements. As among the Plains Indians, the nose tip or the entire nose of adulterous women might be cut off among the Navajo and Apache.

It was difficult, historically, for Europeans to understand Indian concepts of crime and punishment. At Fort Defiance, in 1858, the soldiers shot a number of Navajo owned horses. The owners could not force the military to pay compensation for the lost horses, so they killed a slave belonging to the commanding officer by way of retribution. This angered the military and, to mollify them, the Navajos killed a Mexican and dragged the body into Fort Defiance in lieu of surrendering the killer of the slave. The behavior of the Navajos was incomprehensible to the military; and the behavior of the military was beyond the understanding of the Navajos.

Traditional concepts of justice continue to influence tribal court decisions in modern times.

The military, the Agents in charge of reservations, and the Courts of Indian Offenses administered justice in conformity with European-American concepts of law and justice, whereas the tribes continued many of their traditional practices well into modern times; in fact, traditional practices continue to

the present day, and traditional concepts of justice influence the decisions of tribal judges despite the fact that the tribal law codes are generally patterned on non-Indian concepts of justice.

The Cherokee Nation maintained a tribal police force in pre-Civil War times, and during the period 1860-1878 Indian Agents on a number of reservations informally organized a force of Indian police to assist in keeping order. The Navajo, Pawnee, Klamath, Modoc, Apache, Blackfeet, Chippewa, and Sioux had such forces during the period in reference and, in 1878, the Commissioner of Indian Affairs directed all Agents to organize Indian police on their reservations. However, the Indian police were poorly financed until recent years and, until the tribes reorganized their tribal governments the Indian police functioned primarily as arms of the Federal Government rather than the tribe.

Following reorganization of tribal governments after 1934, many tribes not only established tribal courts for the administration of justice, but tribal police forces as well, for the enforcement of tribal laws. The modern tribal police are an arm of the tribal government today. Their organization and procedures differ little from those of municipalities elsewhere in the nation.

Indian tribal governments are part of the system of government in the United States on a par with state & municipal governmental organizations.

All in all, Indian tribal government has been re-established as one of the several institutions of democratic representative government on the American scene - national, state, county and municipal. Tribal governments function generally within the limiting framework of Federal laws, and most of them are organized along Anglo-American lines. The major distinguishing feature between tribal governments and the other forms of American government lies in the derivation of their right to exist - tribal governments derive this right, along with their basic powers, from residual tribal sovereignty, in contradistinction to the national government which derives its powers from the American people through the Federal Constitution; and the state, county and municipal governments which operate within the framework provided by the State and Federal Constitutions, state laws and charters. The broader framework surrounding Indian tribal

government is Federal rather than State because of the fact that, after adoption of the American Constitution, the Federal Government took exclusive jurisdiction over Indian Affairs.

Reservation Indians are citizens of the United States as well as members of their several tribes. As such they may participate fully in national and state political life including not only the right to vote, but the right to be elected to office in state and national, as well as tribal, government. Within the boundaries of their reservation they are generally subject to tribal and Federal laws and regulations exclusively; outside their reservations they are subject to the same Federal, state and municipal laws and regulations which affect all other citizens. Tribal government has much in common with municipal government except that it is limited by Federal, rather than State law.

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